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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963/1964

ACCELERATED TRANSPORT-PONY EXPRESS, INC., *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

MOTION TO AFFIRM

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.
DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE
EASTERN INDUSTRIAL TRAFFIC LEAGUE, INC.

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July 30, 1964

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Appellees.

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MOTION TO AFFIRM

Appellees, The National Small Shipments Traffic Conference, Inc.; Drug and Toilet Preparation Traffic Conference; and Eastern Industrial Traffic League, Inc., intervened as defendants in the action below pursuant to 28 U.S.C. §2323, as associations of shippers and receivers of freight who were parties to the proceeding before the Interstate Commerce Commission in which the order under review was made. Pursuant to Rule 16(1)(c) of the Revised Rules of this Court, these appellees move that the judgment of the District Court be affirmed on the ground that the question presented is so unsubstantial as not to warrant further argument.

Statement

This is a direct appeal from the judgment of a three-judge district court which dismissed appellants' complaint seeking to set aside an order of the Interstate Commerce Commission issued in an investigation of general increases of motor carrier rates.

Appellants published schedules increasing motor carrier rates within Middle Atlantic Territory and between that territory and New England Territory.[1] The Commission ordered an investigation and, after hearing and further proceedings, concluded that the proposed increases were in general just and reasonable. In some respects, however, it found that the increased rates were not shown to be just and reasonable. The record disclosed instances of rates higher for short hauls within Middle Atlantic Territory than the rates charged by the same carriers for longer hauls over the same routes to or from points in adjacent rate territories. These disparities between intraterritorial and interterritorial rates generally occurred at or near the borders of Middle Atlantic Territory. They are referred to as border point disparities. Thus, the rates from Baltimore to Lynchburg, Virginia (near the border of Southern Territory), were higher than rates over the same routes to Greensboro, North Carolina, 114 miles south of Lynchburg. The former is an intraterritorial movement within Middle Atlantic Territory; the latter is interterritorial to Southern Territory. Rates

1. The boundaries of these territories are defined in *Class Rates, Middle Atlantic and New England Territories*, 67 M.C.C. 741, 743 (Footnotes 4 and 5). Generally stated, Middle Atlantic Territory includes New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, the District of Columbia, parts of Kentucky and Tennessee. New England Territory includes Maine, Vermont, New Hampshire, Massachusetts, Connecticut and Rhode Island.

from Canton, Ohio, to New York (in Eastern Central Territory) were lower than rates from Titusville, Pennsylvania, to New York (in Middle Atlantic Territory), although Titusville was 65 miles closer to New York than Canton. Repeatedly in earlier investigations, the Commission had admonished the carriers to eliminate such disparities.[2] The increase proposal here presented to the Commission for approval markedly accentuated the disparities. Thus, the Class 100 rate on shipments weighing 1,000 pounds, from New York, N. Y. to Bristol, Virginia, was, prior to the increase, $4.17 for a haul of 619 miles, while the rate to further distant Johnson City was $4.13 for a haul of 644 miles. Appellants' schedules increased the rate to Bristol to $4.47 so that what was formerly a 4-cent disparity in relation to Johnson City was increased almost ninefold to a 34-cent disparity. The schedules under investigation were replete with relationships of this kind.

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2. In *Increases, Middle Atlantic and New England, 1948*, 49 M.C.C. 357, 366, the Commission cited the prevalence of these disparities and stated: "The respondents should take prompt action to eliminate such disparities."

In *Class Rates, Middle Atlantic and New England Territories*, 67 M.C.C. 741, 761, the Commission again adverted to border point disparities and stated: "The respondents made no defense of such situations. Higher class rates for lesser distances over the same routes as revealed on this record are clearly unjust and unreasonable. In publishing rates in conformity with our findings in these proceedings, we shall expect the respondents to eliminate all rate disparities similar to that above described."

In *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp.*, 310 I.C.C. 503, 506, the Commission referred to the cited cases and stated: "While some effort has been made by the [Middle Atlantic] Conference to correct the maladjustments thus twice found to exist, they are still reflected in some of the present rates. . . . Repeatedly, the Commission has found that such rate adjustments are prima facie unjust and unreasonable . . . The carriers concerned are again admonished to remove promptly any such disparities that may still exist in these border-point rates."

The Commission thereupon made these findings:

> "We find that the increased rates and charges are just and reasonable, except that, where the resulting rates to intermediate points are higher than the rates to more distant points over the same routes, the former are not shown to be just and reasonable."

It ordered the rate schedules canceled to the extent found not shown lawful without prejudice to their amendment so as to provide for the application of lower rates to more distant points as maxima at intermediate border points (JS 28a).

This issue and the Commission's determination thereof form the basis of the Federal Court action. Willing enough to accept the Commission's approval of the increased rates generally, appellants level this attack on the finding and conclusion that rates higher for short than long hauls are not shown just and reasonable and on the Commission's direction to cancel the schedules to the extent found unlawful.

The three-judge District Court unanimously sustained the Commission's decision. Indeed, at the conclusion of hearing and argument, the Court, after recessing for deliberation, *sua sponte* ordered dissolution of the restraint on the Commission's order while reserving judgment on the merits of the complaint on the ground that it considered the probability of appellants prevailing on the merits insufficient to warrant continuance of the restraining order.

Appellants thereupon applied to the Supreme Court for a stay of the Commission's order pending appeal from the District Court's judgment, Mr. Justice Harlan denied the stay, with leave to renew if the Court notes probable

jurisdiction. In a memorandum issued March 9, 1964, he stated:

> "I conclude that neither the probabilities respecting the outcome of appeal nor the equities point sufficiently convincingly in appellants' favor to justify the granting of a stay at this stage."

The Court suggested that appellants could expedite consideration of the matter by accelerating the filing of their jurisdictional statement. Appellants did not file their jurisdictional statement until May 29, 1964, approximately three months later. In the interim, the Commission, by order dated March 26, 1964, reinstated its order and required appellants to comply by June 26, 1964. Tariffs were filed on May 20, 1964, purporting to comply with the Commission's order. Shipper leagues petitioned the Commission to reject such tariffs for non-compliance and appellants petitioned the Commission for an order approving their filed tariffs as in compliance. Both petitions were denied. Appellants' tariffs purporting to comply became effective June 26, 1964.

Argument

This case presents no substantial question warranting plenary consideration by this Court.

1. *The Commission's determination conformed to statute and regulatory criteria.*

The Commission's order found the increased rates lawful in the main, but in some respects unjust and unreasonable. In a revenue proceeding this is not at all extraordinary. Railroad and motor carrier increases are multi-faceted proposals. That added revenues are needed; that proposed increases do not exceed reasonable maxima

—do not exclude the possibility that particular elements of the proposal may be improper. In such a case, the Commission approves the increases to the extent found just and reasonable and excises those elements found not shown just and reasonable.[3] The increases as a whole were found not in excess of reasonable maxima, but rates higher to intermediate points than to more distant points over the same routes were found not shown to be just and reasonable. These findings conform to well-established principles enunciated in an unbroken line of decisions. The doctrine was concisely stated by Mr. Justice Brandeis in *Patterson* v. *Louisville & N.R.R.*, 269 U. S. 1, 11:

> "Apart from statutory enactment, it is *prima facie* unreasonable to charge more for a shorter than a longer haul."

If railroad common carriers, *prior* to statutory enactment, are held to such a rate restriction, the same must be true of motor common carriers under a regulatory statute that contains no express prohibition. The Commission so held in *Kingan* v. *Olson*, 32 M.C.C. 10, citing *Patterson, supra*. In *Kingan*, the Commission said:

> "The same principles that governed rail rates under such circumstances prior to the 1910 amendment are applicable to similar conditions involving motor carrier rates. Therefore the assailed joint rates are presumed to have been unreasonable to the extent that they exceeded the corresponding aggre-

3. In Ex Parte No. 175, *Increased Freight Rates, 1951*, 297 I.C.C. 17, 51, the Commission found a need for added revenues and that rates increased 15 percent were just and reasonable. In the same order, it found not shown just and reasonable increases proposed on some 30 items and directed the imposition of maxima on such excepted items found not shown reasonable.

> gate of intermediate rates. Defendants submitted no evidence to rebut this presumption." [The aggregate of intermediates violation referred to is *pari materia* with long and short haul violations.]

The presumption of unreasonableness was not rebutted by appellants. This is made clear by the Examiner's discussion of the evidence and the Commission's findings. It was observed that the carriers first pleaded no defense of the situation and later attempted to defend it on the ground that other carriers controlled the rates. This defense was rejected on two explicit grounds: (1) the circumstances recited by the carriers concerning maintenance of the interterritorial rates do not relieve them of individual responsibility; and (2) the carriers are in a position to control their individual rates. This is a determination that the presumption of unreasonableness has not been rebutted. The result, under long-established rule, is that the rate disparities must be held unjust and unreasonable.

Appellants seek to apply standards and criteria appropriate to an undue prejudice case. The Commission's findings, however, were explicitly that rates to intermediate points higher than the rates to more distant points over the same routes "are not shown to be *just and reasonable*". Undue prejudice and preference, a distinct species of rate regulation (U.S.C. §316(d)), formed no part of the Commission's findings and were not necessary to the determination reached or to the validity of the order. In dealing with mal djustments at intermediate points, the Commission exercised its authority under the reasonableness requirements of the law (U. S. C. §316(b)).

Long and short haul violations sound in unreasonableness. They have uniformly been characterized in those

terms by Court and Commission. In *Patterson* v. *Louisville & N. R.R., supra,* Justice Brandeis declared it is prima facie "unreasonable" to charge more for a shorter than a long haul. In *Atlas Portland Cement* v. *N. & R. R.R.*, 120 I.C.C. 583, 585, Commissioner Eastman described the higher charge for the shorter haul as "unreasonable". In the very territory here involved, of the same sort of border violations as are here in issue, the Commission stated, *Class Rates, Middle Atlantic and New England Territories,* 67 M.C.C. 741, 761:

> "Higher class rates for lesser distances over the same routes as revealed on this record are clearly unjust and unreasonable."

This was the express finding of the Examiner in the instant case. It was the finding made by the Commission. Based on this finding, the Commission exercised its authority to make an order under §316(e):

> "Whenever, after hearing . . in an investigation . . . the Commission shall be of the opinion that any individual or joint rate . . . is or will be unjust or unreasonable . . . it shall determine and prescribe the lawful rate, fare, or charge or the maximum or the minimum . . . rate, fare or charge thereafter to be observed, . . ."

To inject into a case involving an issue uniformly characterized as one of rate reasonableness, the evidentiary requirements of an undue prejudice complaint, is a gratuitous undertaking. Yet that is the nature of appellants challenge to the Commission's order and the major preoccupation of their argument. The evidence considered by the Commission and the findings made by it emanated not from undue prejudice but from rate unreasonableness.

This is clear from the Commission's ultimate finding and conclusion—"To the extent that such maladjustments occur, the increased rates are unjust and unreasonable." Criteria of undue prejudice, elaborated at length by appellants, are irrelevant to that determination.

In *Middlewest Exceptions Ratings—Cancellation*, 48 M.C.C. 53, 57, the Commission dealt with similar maladjustments. It condemned rates higher for short intraterritorial hauls than for longer interterritorial hauls. It stated:

> "Such rates are prima facie unreasonable. Respondents have the burden, under section 216(g) of the Interstate Commerce Act, of showing that the proposed changed ratings are just and reasonable. They have not sustained this burden. The maladjustments and disparities in the rates which would result from the proposed ratings compel the conclusion that the proposed schedules are unlawful."

In the *Middlewest* case, the Commission condemned the disparities as unreasonable even though it affirmatively appeared that findings of undue preference and prejudice could not be made (48 M.C.C. 53 at 57).

Appellants lean heavily on *United States* v. *Chicago, M. & St. P. R.R.*, 294 U. S. 499, and *State of New York* v. *United States*, 331 U. S. 284. *Chicago* involved rate reductions assailed as disruptive of the rate structure on coal between particular points The *New York* case was an investigation instituted by the Commission into class rates and classifications in railroad territories. Neither case is responsive to issues entailed in a revenue proceeding involving general increases in the rates. Appellants themselves are at pains to argue the distinction between

a revenue case and a rate case. Appellants declare (JS 14):

> "The problem in revenue cases is to determine whether the rates under investigation are 'below the lowest or above the highest reaches of reasonableness.' The problem in rate relationship cases is to determine whether the relationships under investigation result in discrimination or preference or prejudice."

The *Chicago* case and the *New York* case, *supra*, were both rate cases. This is a revenue proceeding. In this proceeding, the Commission examined the proposed increases, found them not in excess of maximum reasonable rates in the presence of a need for added revenues. It approved the increased rates so found just and reasonable but, observing improprieties in the proposed increases in the prevalence of rates higher for short than for longer hauls at border points, it found such disparities not shown just and reasonable and ordered them canceled. For this determination, the District Court found "There is ample warrant in the evidence and the statute . . ." (JS 11a).

Appellants' disclaimers of responsibility for the rate disparities and protestations that they are powerless to control them are contradicted by the evidentiary record on the basis of which the Commission found that the appellants were responsible for the disparities and had it within their power to remove them, by independent action if necessary. Indeed, events which followed the District Court's dissolution of the restraint on the Commission's order and this Court's denial of a stay—i.e., publication of tariffs by appellants accompanied by assertions that they constituted compliance with the Commission's order (*supra*, p. 5)—furnish an apt commentary on the Com-

mission's discernment in rejecting appellants' pleas of impotence and its insistence that it *was* within appellants' power to remove the interdicted disparities.

2. *The decision of the District Court is clearly correct.*

In an opinion which fully considered appellants' contentions, the three-judge District Court unanimously sustained the Commission's decision (JS 1a).

The Court first dealt with these contentions (JS 5a): (1) the "presumption" merely shifted the burden of going forward with proof; and (2) even if the disparities have probative value as evidence of unreasonableness, the evidence as a whole does not support a finding that they are unreasonable. The District Court discusses these contentions in light of the prohibition of §316(d) of unjust and unreasonable charges and the burden of proof imposed on carriers by §316(g) to show that proposed changed rates are just and reasonable (JS 6a).

Applying these statutory standards obviates the need for resort to the theory of presumptions elaborated by appellants. The Court adverts to the long-established principle that rates higher for short than long hauls significantly affect their reasonableness. This Court enunciated the doctrine in *Patterson, supra,* and the Commission has followed it and consistently applied it in motor carrier rate-making since the earliest days of motor regulation (JS 7a).

The Court notes that appellants presented no "evidence of segregated costs for the particular traffic" or other factors that might justify higher rates for shorter hauls at border points (JS 7a), nor do they claim that, without the border point increases, the general increases approved

by the Commission are unremunerative (JS 8a). The Court sees no inherent inconsistency between findings that increased rates of the carriers as a whole were just and reasonable, while the border point disparities were not. Appellants signally failed to support their burden of showing that the border point rates were just and reasonable (JS 8a).

The Court terms appellants' effort to inject the issue of undue prejudice as irrelevant to the issues or proof in this case. The Commission's report is "unmistakably clear" that the basis for condemning the border point disparities is that they were not shown to be just and reasonable. Findings of undue prejudice were neither made nor were they necessary to the validity of the order (JS 10a).

Appellants' contention that they had no control over rates beyond the border "was specifically rejected by the Commission" (JS 11a). The Court finds no meritorious legal basis for attack on the Commission's order that the schedules be cancelled to the extent found unlawful, without prejudice to their amendment. It concludes there is ample warrant in the evidence and statute for the Commission's findings and conclusion and orders the complaint dismissed (JS 12a).

3. *Appellants' position is based on misconceptions of the facts as well as of the controlling authorities.*

(A) The Commission's Findings

Appellants' contention that the Commission's findings as to border point disparities cannot co-exist with findings approving the increases in other respects, rests on

exceedingly insecure factual predicates. They complain that the Commission, having found on the record that "the rates are at a just and reasonable level and properly related to one another", nevertheless ordered canceled certain rates at border points that were higher for short than for longer hauls. The argument is that, if the Commission places the seal of its approval on the carriers' increase schedules with respect to revenue need and the distribution of increases among various categories of traffic (¶16, Complaint), it is inconsistent with such a determination to find rate disparities at border points unjust and unreasonable. To order their cancellation, it is contended, is therefore arbitrary and capricious (¶17, Complaint).

Appellants go to some lengths to construct this argument. Thus, in ¶16 of the Complaint they allege that the Commission in its report made these distinct findings: (1) that the carriers were in need of added revenues; (2) that the rates in issue would not produce revenues in excess of that need; (3) that the rates justly and reasonably distributed the burden of meeting the need among the various categories of traffic. This enumeration of "findings" is pursued even further in the Jurisdictional Statement which declares (JS 5) the Commission also found that the increased rates "were properly related to one another". Appellants' brief to the District Court asserted that the Commission "specificaliy" so found (p. 17). The Jurisdictional Statement omits the word "specifically".

An examination of the Commission's report discloses no such enumeration of findings. Everything the Commission said by way of findings and conclusions on this issue

appears at page 177 of its report (JS 28a). The findings articulated are these:

1. flat-sum increases are not inherently unlawful;
2. using carriers' cost estimates, increases on shipments under-6,000 pounds do not produce rates which exceed reasonable maxima;
3. resulting higher rates to border points than to points beyond over the same routes are unjust and unreasonable;
4. the increased rates are just and reasonable except that higher rates to intermediate points than to more distant points over the same route are not shown to be just and reasonable.

No findings were made, as argued by appellants, that the rates would not produce revenues in excess of need or that the rates were properly related to one another. Indeed, indications in the report are that the rates exceed revenue need by substantial margins. This was admitted by the carriers as to the truckload rates (Examiner's Report, sheet 13) and is apparent from Appendix C to the Commission's report. At page 174 (JS 22a), the report notes that Class 70 is considered the average rating of less-truckload shipments. Appendix C (319 I.C.C. 168 at 180) discloses that the increased Class 70 rates are very substantially in excess of single-line revenue need (including 7 percent profit) for all distances longer than 25 miles. This covers rates on less-truckload shipments in all weight categories. Thus, Appendix C reveals that Class 70 rates exceed revenue need (including 7 percent profit) by about 12 percent for shipments under-2,000 pounds; by more than 20 percent for shipments in the 2,000-5,999-pound category; by as much as 49 percent in the under-6,000-pound category.

As for the 'finding" that the rates in issue were properly related to one another, the Commission's express findings with respect to border point maladjustments dispels any such motion. The Commission neither made such a finding nor was it obliged to.

(B) Interterritorial Rates Not In Issue

In arguing that a finding of undue prejudice could not here be made, appellants extract from context in the Commission's report the statement that interterritorial rates are not here in issue (JS 6; 12). It is interesting to observe that the statement "interterritorial rates are not here in issue" was first the Examiner's, and later, the Commission's answer to the proposition put by a carrrier witness that the Commission should deal with the border point disparities by requiring interterritorial rates to be raised. The Commission's answer was direct and forthright:

> (1) the Middle Atlantic rates—not the interterritorial rates—are in issue;
>
> (2) the carriers participating in the tariffs are not relieved of responsibility for the rate anomalies;
>
> (3) they control the rates and, by independent action, if need be, they can remove the rate disparities.

Appellants' reliance on the quoted statement is linked to its argument that findings of undue prejudice are necessary and cannot here be made. It invokes assumptions and conjectures that rates for the longer interterritorial hauls may be too low. Such assumptions cannot be held to disable the Commission from dealing effectively with maladjustments and rate disparities found unjust and unreasonable in the investigation proceeding to which the carriers are party. In *Fleet Lines, Inc.* v. *Northern Transporta-*

tion Co., 54 M.C.C. 575, the Commission answered an argument that rates to the further distant point were unreasonably low. It pointed out that it was the higher rate at the intermediate point that was in issue and that rate was found unreasonable in exceeding the rate for a longer haul.

In *Oklahoma Portland Cement* v. *M.K.T.R.*, 139 I.C.C. 685, the Commission adverted to the possibility that the lower rate to the distant point "might well be" lower than a reasonable maximum rate. That possibility notwithstanding, the Commission held that prima facie the higher rate to the intermediate point was unreasonable and if not rebutted becomes unlawful.

(C) Revenue Case v. Rate Case

Appellants draw distinctions between a revenue case and a rate case (JS 12) and then quote from §316(i) as providing governing criteria for a revenue case such as this (JS 13). In quoting, appellants inexplicably omit the prefix to §316(i)—"In the exercise of its power to prescribe just and reasonable rates • • •". They also neglect to include the vital phrase "among other factors" which appears in this section among the elements the Commission is to consider in addition to public need for adequate service and carrier need of sufficient revenues. Quoting a rate-making rule so emasculated, appellants attack as erroneous the Court's holding that there was no inconsistency between the Commission's finding that higher rates to border points were not shown just and reasonable and its finding that increased rates of the carriers as a whole were reasonble (JS 13).

There is no inconsistency. The late Commissioner Clyde B. Aitchison in "Fair Reward and Just Compensation" (p. 5) observed that the differences between revenue and

rate cases are largely those of emphasis. "In either case the resulting rates must be just and reasonable, and otherwise in conformity with the Act".[4] This, of course, is the meaning of the presence of "just and reasonable" and "among other factors" in the rate-making rule. It is also the answer to appellants' contention that the statute's standards may be satisfied by showing that the intraterritorial rates were within the zone of reasonableness. This may evidence that the level of the rates is reasonable. It notably fails, in the case of rates higher for short than for long hauls, to satisfy the requirement that they be "just". The prohibitions of §316(d) reach rates that are unjust as well as those that may be unreasonable. It is not essential to resort, in this case, to the undue prejudice provisions.

4. C. Aitchison cites *United States* v. *State of Louisiana*, 290 U. S. 70, 76-78, and *King* v. *United States*, 344 U. S. 254, 275-276. In *Louisiana*, the Court, dealing with the legislative ancestor of §15(a)(2), held that the Commission, in raising rates to yield a fair return, exercised its powers to prescribe just and reasonable rates and had reasonable latitude to modify or adjust any particular rate it may find to be unjust or unreasonable. This power, under §15(a)(2), was carried over to intrastate discrimination under §13(4) held to be under the same standard of reasonableness. Thus, under §13(4), as under §15(a)(2), reasonable latitude must be given for modification of particular rates found to be unreasonable. Since that decision in 1933, the rate-making rule of §15(a)(2) was further amended and the proviso eliminated. Nevertheless, in *King* v. *United States* decided in 1953, after §15(a)(2) was amended so that it is substantially in accord with §316(i), the Court stated: "Where the Commission seeks to deal generally with rates and revenues in a large area on evidence typical of the area as a whole, it may proceed by way of a general order supported by sufficient evidence applicable to the whole territory. At the same time, it is well for it to leave the way open, as it did here, for modifications of that general order in specific situations where the general order is not *justly* applicable." (emphasis added).

(D) Patterson v. L. & N. and the Maggioni Case

Appellants brush past the enduring precept enunciated by this Court in *Patterson* and light upon a view expressed at an earlier stage of that suit by the Circuit Court, viz., as the Commission had found the charge not unreasonably high, the presumption that a through rate in excess of the aggregate of intermediate rates is unreasonable, had been rebutted. The actual decision of the Circuit Court was grounded on complainants' failure in that case to prove their pecuniary damage. This was the crux of the matter as indicated by the Circuit Court: "It is necessary to consider only one point here involved, namely, whether a suit for damages can be maintained under the set of facts stated in the petition and exhibits, without some allegation of special damage to each of complainants." 2 F. (2d) 592, 593. When the cause reached the Supreme Court, it became clear that the alleged violation of §4 (as amended in 1910 to prohibit higher through rates than the aggregate of intermediates) had been protected by an application, timely filed, for relief. This Court then held, there can be no recovery under §4 and there is no occasion to consider whether damages were recoverable without proof of pecuniary loss. The Court pointedly declined to accept the dictum of the Court below as to whether the presumption that the higher through rate is unreasonable is rebutted by a Commission finding that the charge is not unreasonably high. It said (269 U. S. 1 at 8):

> "We have, therefore, no occasion to pass upon the effect of the finding that the through rates were 'not unduly high' e on the other questions discussed by counsel bearing upon liability under §1."

Frail though this straw is as support for appellants' position, they seize it and argue that the Commission, in

Maggioni & Co. v. *Atlantic Coast Line R.*, 272 I.C.C. 127, adopted the Court of Appeals' dictum (JS 11). Appellants quote from the Commission's report, the statement that any presumption of unreasonableness is rebutted by the fact that the rate to the intermediate point is below a basis "recognized as a reasonable maximum by this Commission" (JS 12). Appellants neglect the significant statement that appears in the preceding paragraph of the Commission's report (272 I.C.C. 127 at 131): "The first-class rate is that *prescribed* in the western-southern revision" (emphasis added). The significance of the prescription is that, under the doctrine of *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, reparation cannot be awarded where a maximum reasonable rate had previously been prescribed and the assailed rate did not exceed it. This is manifestly what the Commission meant in *Maggioni* when it spoke of "a basis recognized as a reasonable maximum by this Commission". This provides scant support for appellants' view that *Maggioni* "holds that the presumption * * * is rebutted by a showing that the higher rates are themselves within the zone of reasonableness". *Maggioni* can only be accepted as holding that reparation cannot be recovered where the higher assailed rates were Commission-prescribed.

Nor does *Oklahoma Portland Cement Co.* v. *N.K.T.R.*, *supra*, lend substance to appellants' contention that the presumption of unreasonableness has here been rebutted. *Oklahoma* restates the principle that higher rates to intermediate than to further distant points are prima facie unreasonable. It lays emphasis on the rebuttable nature of the presumption, observing that "it might well be that the rate to such further distant point is lower than a

maximum reasonable rate". That possibility notwithstanding, the Commission declares:

> "But in such situations there is a prima facie presumption that the higher rates to the intermediate points are unreasonable. In *Lee Farms Co. v. L. & N. R.R. Co.*, 93 I.C.C. 699, division 4, in dealing with a similar situation, said:
> We are of opinion that there is no justification for charging a higher rate * * * to Mansfield than * * * to Buffalo, Detroit, Cleveland, and Sandusky; and that no evidence has been presented which adequately rebuts the presumption that this higher rate was unreasonable. * * *
>
> *Disposition of the case must, therefore, be determined by ascertaining whether the defendants' evidence is sufficient to rebut the presumption* that the higher rates to the intermediate points are unreasonable under section 1." (Emphasis added)

The Commission then held that the presumption remained unrebutted in numerous instances and the rates were found unreasonable. *Oklahoma* must thus be understood as enunciating the view that, despite the possibility that the rate to the further distant point may be too low, the presumption that attaches to the higher intermediate point rates is such as to require rebuttal and disposition of the case turns on whether the carriers produced evidence sufficient to rebut that presumption.

(E) Motor Carriers v. Long and Short Haul Anomalies

Appellants argue that, as section 4 was not incorporated in the Motor Carrier Act, there is no way for the Comission to hold unlawful, long and short haul disparities in motor carrier rates except upon findings of undue prej-

udice (JS 20). This concept of regulatory law is quickly dispelled by the *Patterson* case. That case makes it clear that the effect of a statutory enactment which expressly prohibits rates higher for short than for long hauls is only to restrict the authority of the carrier to initiate such rates. Prior to statutory prohibition, the Court points out, the carriers were "at liberty to introduce the rate without first securing the consent of the Commission." 269 U. S. 1 at 11. The effect of the statute is to require the carrier, upon special application, to obtain authority for the publication of such rates else suffer sanctions for a violation. *Intermountain Rate Cases*, 234 U. S. 476.

The same principles apply under Part II of the Act to motor carrier regulation. But, equally applicable to motor carrier rates, is the rule described by Mr. Justice Brandeis that "apart from statutory enactment, it is *prima facie* unreasonable to charge more for a shorter than for a longer haul". The strength of this rule, and the force of its operation, becomes apparent in a correlative application: even when the Commission grants relief to depart from the prohibition, such rate "are prima facie unreasonable when attacked under §1 of the Act". The Court states that filing an application for relief or even an order granting relief,

> "* * * would not render legal a rate which violated some other section of the Act * * * the Commission is correct in holding, as before stated, that if a through rate higher than the aggregate of the intermediates is attacked under §1, the *prima facie* presumption that such higher through rate is unreasonable, and hence unlawful, obtains now as it did before the 1910 amendment." 269 U. S. 1 at 12.

Thus, whether or not the statute prohibits long and short haul anomalies, such rates are prima facie unjust and

unreasonable. Whether or not the carrier sought or obtained relief by Commission order from the prohibition, complaint could be filed against such rates as unjust and unreasonable and—if such a rate were assailed under section 1—the prima facie presumption that it is unreasonable, and hence unlawful, would apply. The Court's affirmance in *Patterson* of the decisions below refusing damages, was based simply on the fact that departure from section 4 had been authorized and the complaint was based, not on section 1, but on section 4.

The *Patterson* case is instructive here. There is no §4 prohibition in Part II of the Act regulating motor carriers. This only means that motor carriers here—as in the case of rail carriers prior to the 1910 amendment—were "at liberty to introduce the rate without first securing the consent of the Commission". The appellants have done that by publishing their increases which include the border point disparities. But, *Patterson* insists, the chemistry of long and short haul disparities, compounds ingredients of unjustness and unreasonableness. In the words of the Court below, when a rate is higher for a short than for a long haul, this is "so significant an element affecting reasonableness" as to impart the character of prima facie unlawfulness (JS 6a). Unless the carriers defend and justify such rates, the Commission may find them unlawful and direct their cancellation. The Commission found here that the carriers first pleaded no defense and later attempted to defend rate disparities on the ground that other carriers control the rates. This defense was rejected (*supra*, p. 7). The result, under the established rule is, that the presumption of unreasonableness stands unrebutted. The rate disparities must be held unjust and unreasonable.

Appellants pursue a tortuous dialectical course that leads them to this remarkable thesis (JS 21): motor car-

riers are free to transport "at whatever lawful rates they choose" and neither Commission nor Court can require elimination of long and short haul anomalies except where undue prejudice can be found.

Such a view is neither articulated in the regulatory statute nor supported by the cases. The Commission has not condoned it and this Court has never endorsed it. The intricate refinements of pleading and practice that prevailed in 1924 when the *Patterson* case was decided is no longer part of our legal system. The narrow decision in that case that, Section 1 not having been violated, no reparation award may stand—is responsive to procedural elements endemic to that day. The great principle enunciated by that case, placed the imprimatur of Supreme Court approval on a doctrine that has been applied from the earliest days of the Commission's regulation of carriers.[5] It is still the law today.

The court below recognized that the Commission acted within the framework of these principles in holding unlaw-

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5. In its Tariff Circular No. 6-A (20 I.C.C. Ann. Rep. 170), issued shortly after passage of the Hepburn Act of 1906, the Commission announced that "it would be its policy to consider the through rate, which is higher than the sum of the locals between the same points, as prima facia unreasonable, and that the burden of proof would be upon the carrier to defend such higher through rate."

The Mann-Elkins Act of 1910 introduced a prohibition of such rates into Section 4 of the Act where it stands today alongside the long and short-haul clause. The *Patterson* case in 1924 clarified the relation of statutory enactment on the subject to the legal presumption that arose independent of statute. The presumption continues with unabated vigor. Rates higher for short than long-hauls are prima facie unjust and unreasonable and may be assailed under the unreasonableness sections of the Act even though a violation has been cleared under Section 4 by the grant of relief. The *Patterson* principle is firmly imbedded in our jurisprudence and has been consistently followed since that time. *Sun Oil* v. *Central R. Co.*, 301 I.C.C. 558, 560; *Mason Co.* v. *Baltimore & O. R.R.* No. 34233 (unreported) Jan. 1964.

ful the border point disparities and requiring their elimination from the general rate increases otherwise approved. That decision is in all respects correct and no substantial questions survive that merit plenary consideration by this Court.

Conclusion

The processes of thought that motivated appellants to apply to this Court by direct appeal rather than by petition for writ of certiorari are detailed in the Jurisdictional Statement (JS 8-10). Nothing therein set forth furnishes a reason why this Court whose burdens "are heavy enough, probably heavier than any other Court in the world",[8] should take jurisdiction of a case where no serious legal questions survive the Commission's determination of the issue and the District Court's review of that decision. Appellants state (JS 9): "• • • this Court has no discretion to decline to consider the m[illegible]" of cases coming to it on direct appeal in contrast with certiorari. Appellants appear to view selection of the appeal route as investing their position with a substantiality that, under certiorari, it might not have. It seems appropriate to observe that obligatory review under the direct appeal procedure is not synonymous with notation of probable jurisdiction. Tests of substantiality are essentially the same as under petition for writ of certiorari. The practice is the same on direct appeal as by petition for writ, that a minimum of four justices must be of opinion that the questions presented merit full briefing and oral argument. *Ryton* v. *Price*, 360 U. S. 246, 247.

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5. Appellants' statement in opposition (July 10, 1964) to appellees' petition to include shipper leagues in the enlargement of time granted the government to file response to Jurisdictional Statement.

It is respectfully submitted that none of the questions raised by appellants' Jurisdictional Statement is sufficiently substantial to warrant plenary consideration by this Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

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